



PATENT
Attorney Docket No. 10222.0001

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:)
)
Duane LANGENWALTER) Group Art Unit: 3679
)
Application No.: 10/797,410) Examiner: Michael P. Ferguson
)
Filed: March 10, 2004)
)
For: DECORATIVE FENCING SYSTEM) Confirmation No.: 4112
)

Attention: Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

APPEAL BRIEF

In accordance with 37 C.F.R. § 41.37, accompanied by a petition and requisite fee for a two-month extension of time, and in support of the Notice of Appeal filed November 21, 2006, Appellant presents this Appeal Brief, and encloses herewith a check in the amount of \$500 required under 37 C.F.R. § 1.17(c).

This Appeal responds to the August 22, 2006 final rejection of claims 1-16.

Real Party In Interest

The real party in interest is the Assignee, Garden Zone, L.L.C., as evidenced by an assignment recorded at the U.S. Patent and Trademark Office on March 10, 2004, at Reel 015884, Frame 0347.

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Related Appeals and Interferences

There are no prior or pending appeals, interferences, or judicial proceedings, known to the Appellant, Appellant's representative, or the Assignee, which may be related to, directly affect, or be directly affected by or have a bearing on the Board's decision in the pending appeal by the Assignee. Appellant filed a divisional application on January 18, 2007, which is commonly owned and has common subject matter. The divisional application may be directly affected by the Board's decision in the pending appeal.

Status Of Claims

Twenty (20) claims were filed in this case. Claims 17-20 were cancelled for resubmission in the divisional application.

Claims 1-16 are pending in this case, stand rejected, and are on appeal.

Status Of Amendments

In response to a Final Office Action dated August 22, 2006, Appellant filed an Amendment After Final on November 21, 2006, and a Supplemental Reply After Final on December 7, 2006. The Examiner entered and considered both the Amendment After Final and the Supplemental Reply After Final, but in an Advisory Action dated December 27, 2006, maintained the final rejection of claims 1-16.

Summary Of Claimed Subject Matter

Claims 1 and 16 are independent claims. Claims 2-15 depend from claim 1, directly or indirectly. A concise explanation of the subject matter of claims 1 and 16 follows:

A. Claim 1

Claim 1 recites a fencing system comprising the following elements:

1. A plurality of stakes are configured to be driven into the ground (page 9, lines 15-23, Figs. 1 and 2, element 40). Each stake has a hollow stake sleeve with an internal diameter (page 10, lines 3 – 25; Fig. 2, element 42).
2. A plurality of posts are provided, each post having a diameter smaller than the internal diameter of each hollow stake sleeve (page 7, lines 10-12; page 10, lines 3-10; Figs. 1 and 2, element 20). Any one of the posts is slidably, interchangeably insertable into, and frictionally and removably retained by, any one of the stake sleeves (page 10, lines 3-10; Figs. 1 and 2, elements 20 and 42).
3. A plurality of structural fencing components are provided (page 7, lines 5 – 12, Figs. 1 and 3, elements 14, 16, and 18). Each fencing component includes at least one post attachment collar disposed on one edge thereof. Each post attachment collar has an annular opening (page 7, lines 13-18; Fig. 1, element 22). The annular opening of each attachment collar has a diameter larger than the diameter of each post (page 7, lines 18-19, Fig. 1, element 22). Any one of the fencing components can slidably, pivotally, removably and interchangeably attach to any one of the posts (page 7, lines 11-21; page 12, lines 12-25; page 13, lines 1-8; Figs. 1 and 3, elements 12, 14, 16, 18).

B. Claim 16.

Claim 16 also recites a fencing system.

1. At least one wedge-shaped stake is configured to be driven into the ground (page 9, lines 19-22; Figs. 1 and 2, element 40).

2. The at least one stake includes a stake sleeve defining a cylindrical cavity within the stake, (page 10, lines 3-5). The stake sleeve has an internal diameter (page 10, line 7, Fig. 2, element 42).

3. At least one cylindrical post (page 7, line 12; page 10, line 5; Figs. 1 and 2, element 20) has a first diameter smaller than the internal diameter of the hollow stake sleeve (page 10, lines 4-7; Fig. 2, elements 20, 42). The at least one post slidably inserts into and is frictionally and removably retained by, the hollow stake sleeve (page 10, lines 8-10; page 12, line 25; page 13, line 4, Figs. 1 and 2, elements 20 and 42, Fig. 2).

4. At least one structural fencing component (Fig. 1 and 2, elements 14, 16 and 18) has at least one post attachment collar on an edge thereof (page 7, lines 5-12; Fig. 1, element 22). The post attachment collar has an annular opening therethrough, with a diameter larger than the diameter of the post (page 7, lines 13-18; Fig. 1, element 22). The fencing component slidably, rotatably, and removably attaches to the post by insertion of the post through the post attachment collar (page 7, lines 11-21; page 12, lines 12-25; page 13, lines 1-8; Figs. 1 and 3, elements 12, 14, 16, and 18). The fencing components include interchangeable base units, interchangeable gate units, and interchangeable end units.

5. The interchangeable base units each include a vertical element on either side (page 8, lines 3-8; Fig. 1, element 30), and a post attachment collar or post rings on both vertical elements (page 8, lines 7-11; Figs. 1, 2, element 22).

6. The gate units include a pair of complementary doors (page 7, lines 22-29; Fig. 1, element 16). Outside edges are vertical elements including a post ring and a

hinge element, to allow the doors to swing open (page 7, lines 22-24; Fig. 1, elements 16, 30, 24, 34).

7. The end units include a vertical element (Fig. 1, element 30) on one edge, with post rings disposed at the top and bottom of the vertical element (Fig. 1, element 22).

8. A stake pin is inserted into the ground to anchor the end unit (page 11, lines 16-19; Fig. 1, element 46).

Grounds of Rejection To Be Reviewed On Appeal

1. Claims 1, 2, and 10 stand rejected under 35 U.S.C. § 102(b) over U.S. Patent 803, 741 to Carlson.

2. Claims 11-15 stand rejected under 35 U.S.C. § 103(a) over Carlson in view of U.S. Patent 6, 811,145 to Gibbs.

3. Claims 1-10, and 16 stand rejected under 35 U.S.C. § 103(a) over U.S. Patent 1,426,215 to Ravert in view of Carlson.

Argument

A. Claims 1, 2 and 10 are patentable under 35 U.S.C. § 102(b) over Carlson because Carlson does not disclose every element of claim 1, expressly or inherently.

For purposes of this argument on Appeal, claims 1 and 10 stand or fall together. Claim 2 stands or falls separately.

A claim is anticipated under 35 U.S.C. § 102 only if each and every element set forth in the claim is disclosed, either expressly or inherently, in a single prior art reference. Structural Rubber Products Co. v. Pack Rubber Co., 749 F.2d 707, 715 (Fed. Cir. 1984); M.P.E.P. § 2131.

Inherency is not a subjective analysis for determination by each Examiner. A claim limitation is inherent in a prior art reference only if it is necessarily present in the reference, not merely probably or possibly present. Rosco, Inc. v. Mirror Lite Co., 304 F.3d 1373, 1380 (Fed. Cir. 2002). Inherency does not embrace probabilities or possibilities. Trintec Indus. Inc. v. Top-U.S.A. Corp., 295 F.3d 1292, 1297 (Fed. Cir. 2002). To establish inherency, the extrinsic evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill in the art. The mere fact that a certain thing may result from a given set of circumstances is not sufficient to establish inherency. In re Robertson, 169 F.3d 743, 745 (Fed. Cir. 1999).

1. Plurality of Stakes Configured to be Driven Into The Ground

The first element recited in claim 1 is “a plurality of stakes configured to be driven into the ground, each said stake including a hollow stake sleeve having an internal diameter.”

Carlson does not expressly disclose “a plurality of stakes configured to be driven into the ground.” The specification of Carlson only discloses at col. 1, lines 25-29: “Figure 1 shows a perspective view of my invention complete applied to use. Figs. 2 and 3 show different forms of anchoring devices that may be employed for securing my invention in its operative position.” The anchoring device 5 depicted in Fig. 2 appears to be a stake “configured to be driven into the ground.” The anchoring device 6 in Fig. 3, however, is not a stake “configured to be driven into the ground.” It has a flat bottom, indicating that anchoring device 6 is an above-ground anchor, configured to rest on a generally flat surface, but not to be “driven into the ground.” Moreover, while it can be

seen in Fig. 1 that the fence is secured at three (3) anchor points, it is not expressly stated in Carlson whether the three anchor points shown in Fig. 1 comprise a plurality of stakes 5 “configured to be driven into the ground;” or alternatively a plurality of flat-bottomed above-ground anchors 6, which are not “configured to be driving into the ground,” or alternatively some combination of stake 5 and flat-bottomed above ground anchor 6.

Since this claim feature is not expressly disclosed in Carlson, it remains to inquire whether Carlson inherently discloses “a plurality of stakes configured to be driven into the ground.” As discussed above, in view of the Rosco, Trintec, and Robertson decisions of the Federal Circuit, inherency requires that a claim element necessarily arise from the reference’s disclosure, not that the claim element is a mere possibility or even a probability arising from the reference’s disclosure. It is possible that all three anchoring positions shown in Fig. 1 are anchored with the stakes 5 configured to be driven into the ground. Hence, it is possible that Carlson may disclose this first element of claim 1. Nothing in Carlson, however, necessitates that this be the case, however, because it is equally possible that the three anchor points shown in Fig. 1 include three flat-bottomed above-ground anchors 6, or alternatively two flat-bottomed above-ground anchors 6. In summary, it is a possibility that Carlson discloses the first element of Claim 1, but not a necessity. Due to this lack of necessity, Carlson does not inherently disclose the first element of claim 1.

2. A plurality of posts, each said post having a first diameter smaller than the internal diameter of each said hollow stake sleeve

The first half of the second element of claim 1 recites “a plurality of posts, each said post having a first diameter being smaller than the internal diameter of each said hollow stake sleeve.” Carlson, in Figs. 2 and 3, respectively, depicts a post 1 attached to a stake 5, and a post 1 attached to a flat-bottomed above-ground anchor 6. Carlson does not expressly disclose that post 1 is “inserted into” a hollow sleeve of the stake 5, or “inserted into” a hollow sleeve of the flat-bottomed ground anchor 6. Carlson also does not expressly disclose that a diameter of post 1 is less than an internal diameter of a hollow sleeve in the stake 5, or less than an internal diameter of a hollow sleeve in the flat-bottomed above-ground anchor 6. In fact, in Figs. 2 and 3, the posts 1, and the internal portions of the stake 5 and the flat-bottomed above-ground anchor 6, respectively, all appear to be fixed in place, and all of the respective diameters appear to be identical.

Since Carlson does not expressly disclose this claim element, it remains to inquire whether Carlson inherently discloses that post 1 is inserted into and has a diameter smaller than the internal diameter of a hollow inner portion of stake 5 in Fig. 2, or that post 1 is inserted into, and has a diameter smaller than the internal diameter of a hollow inner portion of flat-bottomed above-ground anchor 6 in Fig. 3. Carlson provides no details on the dimensions of his fence components, and no details on how his fence is assembled. It is a possibility that post 1 of Carlson is inserted into a hollow inner portion of stake 5 and has a smaller diameter, and it is a possibility that post 1 inserts into a hollow inner portion of flat-bottomed above ground anchor 6, and has a smaller

diameter. Because of the lack of disclosure on this point, however, it is equally possible that post 1 and stake 5, or post 1 and flat-bottomed above ground anchor 6, respectively, are molded as integral parts, with identical diameters. All of these options are possible, and no disclosure in Carlson necessitates one option or the other. The absence of necessity of this claimed feature arising from the disclosure of Carlson establishes that Carlson does not inherently disclose “a plurality of posts, each said post having a first diameter smaller than the internal diameter each of said hollow stake sleeve” as recited in claim 1.

Moreover, the Examiner’s argument on this claim element, as set forth at page 2, lines 20-21 of the Final Office Action, only addresses the relationship in Carlson of one post to one stake sleeve, *i.e.*, that of Fig. 2 or Fig. 3. The Examiner does not identify any teaching in Carlson, express or inherent, that “each” post has a first diameter smaller than “each hollow stake sleeve.” No express disclosure exists in Carlson of this element. Likewise, no inherent disclosure of the claim element exists in Carlson, for the same reason stated above with respect to a single post, *i.e.*, the absence of necessity of this feature arising from Carlson’s disclosure.

3. “Any one of said posts slidably interchangeably inserting into and being frictionally and removably retained by any one of said stake sleeves.”

In the Final Office Action of August 22, 2006, at page 2, lines 22-23, *et. seq.*, the Examiner characterized Carlson as disclosing:

“any one of posts slidably, interchangeably inserting into and being frictionally and removably retained by any one of the stake sleeves. (Examiner notes that posts 1 directly abut stakes 5 without the use of any adhesive, welding or other joining material, and may be removably and interchangeably used with anchor 6, as interchangeable alternatives, as

shown in Figures 2 and 3. Interestingly, posts 1 engage stakes with a friction-fit. Accordingly, one may remove posts 1 from stakes 5 or stakes 6, if one chooses to do so; Figure 2).”

The statement quoted above consists of supposition and hindsight. Nowhere does Carlson expressly state that his posts are removably retained by any one of the stake sleeves. Carlson's silence regarding use of “adhesive, welding or other joining material,” relied on by the Examiner, does not necessitate a result that the posts are removable from the ground anchors. That teaching exists only in Appellant's application, and it is simply one more detail about which Carlson is silent. In the face of this silence, if “removability” is a possibility in Carlson, then the use of “adhesive, welding or other joining” are equally possible. It is even possible that Carlson molds his components as integral parts. Carlson is full of possibilities, but there is no necessity that this element of claim 1 arises from the disclosure of Carlson, and as discussed above, the Federal Circuit has established that possibility does not equal inherency.

Moreover, even if Carlson's posts in Figs. 2 and 3 were removable from their respective ground anchors 5 and 6, which the Examiner has not established, it does not follow necessarily that the posts are “interchangeable,” as further required by the claim. It is equally possible that each post is sized to fit in only one stake 5 or only one flat-bottomed above-ground anchor 6. In fact, since stake 5 and flat-bottomed above-ground anchor 6 in Figs. 2 and 3, respectively, have different configurations, this latter supposition is at least as possible as the Examiner's unfounded supposition that Carlson's posts and anchors are interchangeable.

In the Advisory Action of December 27, 2006, at page 3, lines 3-4, the Examiner stated that Carlson:

“discloses that either form of anchoring members (5) or (6) attached to the lower end thereof as may be deemed most efficient and desirable, page 1, lines 51-54. This clearly implies removability.”

With all respect to the Examiner, this teaching from Carlson “clearly implies” nothing more than that two optional ground anchors are available, a stake 5 as shown in Fig. 2, and a flat-bottomed above-ground anchor 6 as shown in Fig. 3. It is possible that the posts 1 are fixed in place in either one or the other of the two types of anchor. There is no necessity in Carlson that the posts be removable from the ground anchors. The only thing “clear” in this case is the standard for inherency set forth by the Federal Circuit, *i.e.*, that inherency requires necessity, not possibility or probability. The Examiner has not addressed that clear standard, and Carlson cannot meet that clear standard.

In addition, the Examiner has not addressed the final term in this claim element, that the posts interchangeably insert into and are frictionally removably retained by “any one” of the stake sleeves. Nothing in Carlson’s vague disclosure necessitates this result. It is possible that Carlson’s posts 1 insert into any of ground anchors 5 or 6, and equally possible that Carlson’s posts 1 insert into only a single respective ground anchor 5 or 6. The absence of necessity again forecloses inherency, and so this claim element also is neither expressly nor inherently disclosed by Carlson.

In summary, Carlson does not expressly disclose post diameter smaller than stake sleeve diameter, and Carlson does not expressly disclose that any one of the posts is slidably, removably, and interchangeably insertable into any one of the stake sleeves. Smaller post diameter, removability, and interchangeability of any of the posts and stake sleeves, may be possible results of the vague disclosure of Carlson,

particularly when viewed with the hindsight provided by Appellant's disclosure, but these elements of claim 1 are not necessary results arising from the vague disclosure of Carlson. Possibility does not equal inherency, and so none of these claim elements are inherently disclosed by Carlson.

Nor should the Board assume, that since the claimed features could possibly result from Carlson, that Carlson renders the claims obvious under 35 U.S.C. § 103(a). As mentioned above, in view of the vagueness of Carlson's disclosure, even the possibility of such a result is a result of impermissible hindsight, after reading the present application, so Carlson also does not suggest these features under 35 U.S.C. § 103(a). The "insidious effect of a hindsight syndrome," or use of an Applicant's own teachings against him, appears most often in the case of less technologically complex inventions, but nevertheless remains an impermissible standard for obviousness. In re Dembiczak, 175 F.2d 994, 999 (Fed. Cir. 1999), abrogated on other grounds by In re Gartside, 203 F.3d 1305 (Fed. Cir. 2000); Ruiz v. A.B. Chance Co., 234 F.3d 654, 664-65 (Fed. Cir. 2000). Alternatively, should the Board assume that Carlson's vagueness leaves open the potential to alter the features disclosed in Carlson in order to obtain these claim elements, under In re Gordon, 733 F.2d 900, 902 (Fed. Cir. 1984); and M.P.E.P. § 2143.01, the mere capability of a prior art disclosure to be altered to read on claim language does not create a *prima facie* case of obviousness under § 103(a). Carlson, therefore, in addition to not anticipating claims 1 and 10 under 35 U.S.C. § 102(b) does not render claims 1 and 10 obvious under 35 U.S.C. § 103(a).

4. Claim 2

Claim 2 depends from claim 1, thereby incorporating all of the elements of claim 1. Carlson does not anticipate all of these features of claim 2, for the same reasons stated above. Claim 2 adds a feature that the structural fencing components are selected from the group consisting of base units, gate units, and end units. The specification and drawings disclose and depict the different structures of base unit 14, gate unit 16, and end unit 18, at page 7, lines 6-7, and Fig. 1. Carlson, in contrast, discloses only one structural fence unit, as shown in Fig. 1. Carlson discloses no different base unit, end unit, or gate unit, expressly or inherently, and for this additional reason, Carlson does not anticipate claim 2.

B. Claims 11-15 are patentable under § 103(a) over Carlson in view of Gibbs.

The Examiner has rejected claims 11-15 under 35 U.S.C. § 103(a) over Carlson in view of Gibbs.

Claims 11-15 depend from claim 1. For purposes of this argument on appeal, claims 11-15 stand or fall with claim 1.

The elements of claim 1 are neither disclosed nor suggested by Carlson for all of the reasons discussed above.

Gibbs discloses a fence 10, including vertical posts 12 securely anchored into a substrate 14. (Col. 2, lines 14-15). The posts 12 are not removable from stakes, or interchangeable, and at least for this reason, Gibbs does not provide the teachings that are absent from Carlson, discussed above. Combining Carlson with Gibbs, therefore, fails to suggest all of the elements of claim 1. Combining Carlson with Gibbs also fails to disclose all of the elements of dependent claims 11-15, at least because claims 11-15

incorporate all of the features of claim 1 under 35 U.S.C. § 112, paragraph 6. This combination of references, therefore, fails to present a *prima facie* case of obviousness of claims 11-15.

In addition, in accordance with Teleflex, Inc. v. Ficosa No. Am. Corp., 299 F.3d 1313, 1333 (Fed. Cir. 2002), factual considerations to be made in making an obviousness determination under § 103(a) include consideration of additional evidence which may serve as “secondary indicia of nonobviousness.” Among the secondary indicia of non-obviousness are commercial success, long-felt but unsolved need, and copying. Attached to Appellant’s Amendment After Final of November 21, 2006, and attached in the Evidence Appendix of this Appeal Brief, is a “Declaration of Paul L. Gossling,” President of the Assignee of the present application (“Declaration”). This Declaration attests to the facts that a commercial fence product includes the elements of the claims (Declaration, ¶ 5); the commercial fence product has enjoyed commercial success (Declaration, ¶ 6); the commercial success is due to the features recited in the claims (Declaration, ¶ 8); a long-felt but unsolved need existed for the claimed product (Declaration, ¶ 9); and a competitor has attempted to copy the fence product (Declaration, ¶ 10). This Declaration further demonstrates the non-obviousness of claims 11-15.

C. Claims 1-10 and 16 are patentable over 35 U.S.C. § 103(a) over Ravert in view of Carlson

The Examiner rejected claims 1-10 and 16 under 35 U.S.C. § 103(a) over Ravert in view of Carlson.

Claims 2-10 depend from claim 1. For purposes of this argument on appeal, claims 2-10 stand or fall with claim 1.

Ravert discloses an ornamental miniature fence for placement, e.g., around a Christmas tree (Col. 1, lines 6-11). Longitudinal posts B have lower discs 11, which rest upon a floor, or can be bolted to the floor with a screw 14 (Fig. 4, Col. 3, line 53 - Col. 4, line 102). Ravert does not disclose at least posts removably and interchangeably inserted into hollow stake sleeves of stakes configured to be inserted into the ground, and at least for this reason, Ravert does not disclose all of the elements of claim 1 missing from Carlson. Combining Ravert with Carlson, therefore, does not create a *prima facie* case of obviousness of claim 1. Claims 2-10 incorporate all of the features of claim 1 under 35 U.S.C. § 112, 6th paragraph, and so this combination of references also does not create a *prima facie* case of obviousness of claims 2-10.

Claim 16 is an independent claim and includes some additional limitations that are not recited in claim 1, e.g., the recitation of features of “base units”, “gate units”, “end units”, and a “stake pin”. These additional elements notwithstanding, several elements of claim 1, i.e., a post having a diameter smaller than an internal diameter of a stake sleeve and insertable into the stake sleeve to be “removably retained” by the stake sleeve, are substantially identical to or substantially similar to corresponding elements recited in claim 1, and discussed in detail above.

Carlson does not disclose, expressly or inherently, and does not suggest, the above features of claim 16, for all of the same reasons discussed above with respect to claim 1. Ravert fails to disclose or suggest at least the post 5 removably retained by stake sleeves in stakes configured to be inserted into the ground, and at least for this reason, Ravert does not disclose all of the elements of claim 16 absent from Carlson.

In addition, the Declaration of Paul L. Gossling again establishes secondary indicia of the non-obviousness of claims 1-10 and 16.

CONCLUSION

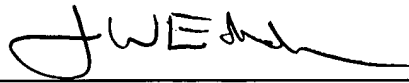
For the reasons given above, pending claims 1-16 are allowable Appellant respectfully requests reversal of the Examiner's rejection.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this Appeal Brief, Appellant requests such extension. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 that are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to Deposit Account 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: March 21, 2007

By: 
James W. Edmondson
Reg. No. 33,871

(viii) Claims Appendix

1. A fencing system comprising:

a plurality of stakes configured to be driven into the ground, each said stake including a hollow stake sleeve having an internal diameter;

a plurality of posts, each said post having a first diameter being smaller than the internal diameter of each said hollow stake sleeve, any one of said posts slidably, interchangeably inserting into and being frictionally and removably retained by any one of said stake sleeves; and

a plurality of structural fencing components, each said fencing component including at least one post attachment collar disposed on an edge thereof, said post attachment collar having an annular opening therethrough, said annular opening having a second diameter larger than said first diameter of each post, any one of said fencing components slidably, pivotally, removably, and interchangeably attaching to any one of said posts, to thereby connect adjacent structural fencing components to each other while allowing said fencing components to be rotationally adjusted relative to said posts.

2. The fencing system of claim 1, wherein said structural fencing components are selected from the group consisting of base units, gate units and end units.

3. The fencing system of claim 2, wherein said base units include a vertical element on either side thereof, and wherein said post attachment collars are disposed on said vertical elements.

4. The fencing system of claim 3, wherein said post attachment collars comprise a pair of post rings disposed at the top and bottom of both of said vertical elements.

5. The fencing system of claim 2, wherein said gate units comprise a pair of complementary doors each having an outside edge, wherein said outside edges terminate in a vertical element and wherein said post attachment collars are disposed on said vertical elements.

6. The fencing system of claim 5, wherein said post attachment collars comprise a pair of post hinges disposed at the top and bottom of said vertical elements, said post hinges including a post ring and a hinge element to allow said complementary doors to open and close.

7. The fencing system of claim 2, wherein said end units include a vertical element on one side thereof and wherein said post attachment collars are disposed on said vertical elements.

8. The fencing system of claim 7, wherein said post attachment collars comprise a pair of post rings disposed at the top and bottom of said vertical element.

9. The fencing system of claim 8, wherein said end unit further includes a stake pin disposed on the side opposite said vertical element, said stake pin being adapted to being inserted into the ground so as to anchor said end unit in position.

10. The fencing system of claim 1, wherein said posts and said structural components further include decorative accents.

11. The fencing system of claim 1, wherein said structural components and said posts are manufactured from tubular steel.

12. The fencing system of claim 11, wherein said structural components are welded in assembly.

13. The fencing system of claim 11, wherein said structural components and said posts are covered with a powder coated finish.

14. The fencing system of claim 11, wherein said structural components, said posts and said stakes are removably attached to each other by frictional contact therebetween.

15. The fencing system of claim 11, wherein said stake is wedge-shaped, and said stake sleeve comprises a cylindrical cavity therein.

16. A fencing system comprising:

at least one wedge-shaped stake configured to be driven into the ground, said stake including a stake sleeve comprising a cylindrical cavity within said stake, said stake sleeve having an internal diameter;

at least one cylindrical post, said post having a first diameter smaller than said internal diameter of said hollow stake sleeve, said post slidably inserting into and being frictionally and removably retained by said stake sleeve; and

at least one structural fencing component including at least one post attachment collar disposed on an edge thereof, said post attachment collar having an annular opening therethrough with a second diameter larger than said first diameter of said post, said fencing component slidably, rotatably and removably attaching to said post to thereby connect adjacent structural fencing components to each other while allowing said fencing components to be rotationally adjusted relative to said post, said structural fencing component being chosen from the group consisting of interchangeable base units, interchangeable gate units and interchangeable end units, wherein:

said base units include a vertical element on either side thereof, and wherein said post attachment collar comprises a pair of post rings disposed at the top and bottom of both of said vertical elements;

said gate units comprise a pair of complementary doors each having an outside edge, wherein said outside edges terminate in a vertical element and wherein said post attachment collar comprise a pair of post hinges disposed at the top and bottom of said vertical elements, said post hinges including a post ring and a hinge element to allow said complementary doors to open and close; and

said end units include a vertical element on one side thereof, wherein said post attachment collar comprise a pair of post rings disposed at the top and bottom of said vertical element, and further wherein said end unit further includes a stake pin disposed on the side opposite said vertical element, said stake pin being adapted to being inserted into the ground so as to anchor said end unit in position.

(ix) **Evidence Appendix**

Attached is a Declaration of Paul L. Gossling.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

Duane LANGENWALTER

Application No.: 10/797,410

Filed: March 10, 2004

For: DECORATIVE FENCING
SYSTEM

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) Group Art Unit: 3679

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) Examiner: Michael P. Ferguson

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) Confirmation No.: 4112

Commissioner for Patents
P.O. Box 1450
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Sir:

DECLARATION OF PAUL L. GOSSLING

1. My name is Paul L. Gossling.
2. I am the President of Garden Zone, L.L.C. ("Garden Zone"), the assignee of U.S. Patent Application No. 10/797,410.
3. I have read and understand U.S. Patent Application No. 10/797,410, for a "Decorative Fencing System," invented by Duane Lagenwalter.
4. The decorative fencing system disclosed in U.S. Patent Application No. 10/797,410 has been embodied in a fencing system product manufactured and sold by Garden Zone under the product name "Empire Fence."
5. Features of the Empire Fence, which are also reflected in the claims of U.S. Patent Application No. 10/797,410 include a number of stakes, having internal sleeves, configured to be driven into the ground, a number of posts

configured to be inserted into the internal sleeves of the stakes, and to be held in place in the internal sleeves by friction, while still being removable, and a number of structural fencing components configured to be pivotably and removably attached to the posts. The diameter of the posts are slightly smaller than inner diameters of attaching rings on the structural fencing components. Furthermore, the inner diameters of the internal sleeves of the stakes are slightly larger than the diameters of the posts. Because of these diameters, the structural fencing components can be removed from the posts, and the posts can be removed from the stakes. For these reasons, the posts and structural fence components are interchangeable, and a wide variety of fence configurations can be assembled by the customer. After assembling one fence configuration, the customer can easily disassemble it, simply by removing the structural fencing components from the posts, and removing the posts from the internal sleeves of the stakes. Due to the interchangeability of the components, the customer can assemble a completely different fence configuration without removing the stakes from the ground. These steps can be performed any number of times, creating a nearly endless variety of fence configurations quickly and easily, according to the desires of the customer.

6. The Empire Fence, as manufactured and sold by Garden Zone, and as described and claimed in U.S. patent application 10/797,410, is very different from prior decorative fencing systems.

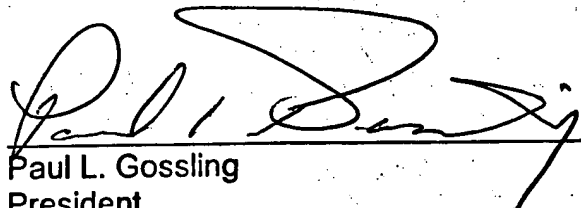
7. The Empire Fence has enjoyed significant commercial success since being introduced on the market in 2004. In the first year alone (2004), sales of the

Empire Fence exceeded \$575,000. In the second year (2005), sales of the Empire Fence exceeded \$3M. To date in 2006, Empire Fence sales have exceeded \$7M.

8. Garden Zone has received numerous comments from our distributors, and our customers, indicating that the surprising commercial success of the Empire Fence is due to its versatility, ease of assembly, ease of disassembly, and interchangeability of the posts and structural fencing components, in order to easily and quickly assemble different fence configurations.
9. Garden Zone's marketing department has received numerous comments from distributors and customers indicating that customers desired such an easy, versatile fencing system for many years, but that this need went unfulfilled until the Garden Zone's Empire Fence was introduced onto the market in 2004.
10. Garden Zone recently has learned from one of its distributors that a competitor of Garden Zone, Panacea Corp. has introduced a competing product onto the market which also has removable posts and structural fencing components. Our initial review of the Panacea fence product indicates that it is substantially the same as Garden Zone's Empire Fence, as disclosed and claimed in U.S. Patent Application No. 10/797,410.
11. I am aware that the willful false statements and the like are made punishable by fine or imprisonment or both, under § 101 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the

above application or any patent resulting thereof, and I hereby declare that
the foregoing statements of fact set forth above are true.

Date: 11-20-06

A handwritten signature in black ink, appearing to read "Paul L. Gossling", written over a horizontal line.

Paul L. Gossling
President
Garden Zone LLC

(x) Related Proceedings Appendix

Attached is a filing receipt from related divisional application No. 11/654,562.



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APPL NO.	FILING NO. 371 (c) DATE	ART. UNIT	FIL FEE REC'D	ATTY. DOCKET NO	DRAWINGS	TOT CLMS	IND CLMS
11/654,562	01/18/2007	3679	500	10222.0001-02	3	7	2

CONFIRMATION NO. 7385

22852

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Date Mailed: 02/09/2007

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Receipt is acknowledged of this regular Patent Application. It will be considered in its order and you will be notified as to the results of the examination. Be sure to provide the U.S. APPLICATION NUMBER, FILING DATE, NAME OF APPLICANT, and TITLE OF INVENTION when inquiring about this application. Fees transmitted by check or draft are subject to collection. Please verify the accuracy of the data presented on this receipt. If an error is noted on this Filing Receipt, please mail to the Commissioner for Patents P.O. Box 1450 Alexandria Va 22313-1450. Please provide a copy of this Filing Receipt with the changes noted thereon. If you received a "Notice to File Missing Parts" for this application, please submit any corrections to this Filing Receipt with your reply to the Notice. When the USPTO processes the reply to the Notice, the USPTO will generate another Filing Receipt incorporating the requested corrections (if appropriate).

Applicant(s)

Duane Langenwalter, Residence Not Provided;

Assignment For Published Patent Application

Garden Zone, L.L.C.

Power of Attorney: The patent practitioners associated with Customer Number 22852.

Domestic Priority data as claimed by applicant

This application is a DIV of 10/797,410 03/10/2004

Foreign Applications

If Required, Foreign Filing License Granted: 02/09/2007

The country code and number of your priority application, to be used for filing abroad under the Paris Convention, is US11/654,562

Projected Publication Date: To Be Determined - pending completion of Missing Parts

Non-Publication Request: No

Early Publication Request: No

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Drt/Pon/2-13-07

**** SMALL ENTITY ******Title**

Decorative fencing system

Preliminary Class

256

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Since the rights granted by a U.S. patent extend only throughout the territory of the United States and have no effect in a foreign country, an inventor who wishes patent protection in another country must apply for a patent in a specific country or in regional patent offices. Applicants may wish to consider the filing of an international application under the Patent Cooperation Treaty (PCT). An international (PCT) application generally has the same effect as a regular national patent application in each PCT-member country. The PCT process simplifies the filing of patent applications on the same invention in member countries, but does not result in a grant of "an international patent" and does not eliminate the need of applicants to file additional documents and fees in countries where patent protection is desired.

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